

Message Text

CONFIDENTIAL

PAGE 01 BONN 15260 01 OF 03 101936Z

73

ACTION EUR-12

INFO OCT-01 ISO-00 CIAE-00 DODE-00 PM-04 H-02 INR-07 L-03

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INFO USMISSION USBERLIN IMMEDIATE

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AMEMBASSY MOSCOW

AMEMBASSY PARIS

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C O N F I D E N T I A L SECTION 01 OF 03 BONN 15260

E.O. 11652: GDS

TAGS: PFOR PGOV WB GW UR

SUBJECT: TAKEOVER IN BERLIN OF ANTI-TERRORISM LAW

REFS: (A) USBER 1875; (B) BONN 15068

BEGIN SUMMARY. AFTER FURTHER BONN GROUP DISCUSSION, ALLIED REPS HAVE AGREED TO RECOMMEND TO CAPITALS THAT THE NEW ANTI-TERRORISM LAW BE APPLIED IN BERLIN WITH THE EXCEPTION ONLY OF ARTICLE 3(2). THIS SECTION EXPRESSLY STATES THAT THE FEDERAL PROSECUTOR HAS THE RIGHT TO DECIDE DISPUTES WHICH MIGHT ARISE WITH THE LOCAL PROSECUTOR OVER HANDLING OF A CASE, AND WOULD THUS APPEAR ON THE SURFACE TO BE AN EXTENSION OF THE FEDERAL PROSECUTOR'S COMPETENCE IN BERLIN. FRG REPS AGREED WITH UNDERSTANDING OF ALLIED REPS THAT SUSPENSION OF THIS SECTION WOULD NOT, HOWEVER, HAVE ANY ACTUAL EFFECT ON THE ABILITY OF THE PROSECUTING AUTHORITIES

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PAGE 02 BONN 15260 01 OF 03 101936Z

TO TAKE NECESSARY ACTION IN PROSECUTING SERIOUS

OFFENSES IN BERLIN. IF AN ALLIED BK/O IS TO BE PUBLISHED SIMULTANEOUSLY WITH THE NEW LAW, IT WOULD HAVE TO BE ISSUED BY TUESDAY, SEPTEMBER 14. ACTION REQUESTED: THAT THE DEPARTMENT INSTRUCT US MISSION BERLIN TO JOIN WITH BRITISH AND FRENCH MISSIONS IN DRAFTING A SUITABLE BK/O AND ALSO TO ASSIST IN PREPARING PRESS GUIDANCE. END SUMMARY.

1. AT BONN GROUP MEETING SEPTEMBER 10, FRG REP (DUISBERG), AFTER CONSULTATION WITH FEDERAL JUSTICE MINISTRY, EXPANDED ON VIEWS HE HAD EXPRESSED AT BONN GROUP MEETING SEPTEMBER 8. HE REITERATED THAT ARTICLE 129A OF THE PENAL CODE (A NEW SECTION ADDED BY ARTICLE 1 OF THE LAW UNDER CONSIDERATION) WAS SEPARATE SECTION FROM SECTION 129, AS NOTED BY MISSION IN REFTEL (A). SECTION 129A REMOVES FROM CURRENT SECTION 129 THE OFFENSE OF ESTABLISHMENT OF CONSPIRACY FOR THE MOST SERIOUS OFFENSES PREVIOUSLY INCLUDED IN SECTION 129, AND MAKES CONSPIRACY TO COMMIT THOSE OFFENSES (MURDER, MANSLAUGHTER, GENOCIDE, CERTAIN OFFENSES AGAINST PERSONAL FREEDOM, CERTAIN OFFENSES CREATING PUBLIC DANGER) SUBJECT TO GREATER PENALTIES THAN WHEN THEY WERE ENCOMPASSED BY SECTION 129. UNDER NEW LAW, SECTION 129 NO LONGER ENCOMPASSES CONSPIRACIES TO COMMIT THOSE OFFENSES SPECIFICALLY COVERED BY SECTION 129A.

2. DUISBERG EXPLAINED THAT ARTICLE 3(1) OF THE NEW LAW -- WHICH AMENDS THE PROCEDURAL LAW (GVG) -- DOES NOT CREATE A NEW COMPETENCE FOR HIGHEST LAND COURTS AND THEREBY FOR FEDERAL PROSECUTOR. IF IT DID, ENTIRE LAW WOULD HAVE REQUIRED BUNDESRAT CONSENT WHICH WAS NEITHER SOUGHT NOR GIVEN. UNDER EXISTING LAW (WITH SECTION 129A OFFENSES STILL INCLUDED WITHIN SECTION 129), FEDERAL PROSECUTOR HAS PROSECUTING COMPETENCE IF INDIVIDUAL CASE HAS SPECIAL IMPORTANCE. CASES COVERED BY SECTION 129A, WHICH WOULD IN ANY EVENT BE OF SPECIAL IMPORTANCE AND THUS PROSECUTABLE EVEN NOW BY FEDERAL PROSECUTOR, WOULD BY OPERATION OF ARTICLE 3(1) OF NEW LAW BY THEIR ADDITION TO SEVEN OTHER OFFENSES ALREADY

CONFIDENTIAL

PAGE 03 BONN 15260 01 OF 03 101936Z

WITHIN ORIGINAL COMPETENCE OF HIGHEST LAND COURTS, FALL WITHIN EXCLUSIVE PROSECUTORIAL RESPONSIBILITY OF FEDERAL PROSECUTOR. ONLY CHANGE IS THAT FEDERAL PROSECUTOR WILL NO LONGER NEED TO ESTABLISH SPECIAL IMPORTANCE OF EACH INDIVIDUAL SECTION 129A CASE IN ORDER TO BE ABLE TO ASSERT HIS PREEMPTIVE AND EXCLUSIVE PROSECUTORIAL RESPONSIBILITY.

3. DUISBERG CONTINUED THAT IF ARTICLE 3(1) OF NEW LAW WERE SUSPENDED IN BERLIN, SUCH ACTION WOULD CHANGE THE EXISTING COMPETENCE OF THE FEDERAL PROSECUTOR. OFFENSES COVERED BY SECTION 129A, HAVING BEEN REMOVED FROM SECTION 129, WOULD NO LONGER BE OFFENSES FOR WHICH FEDERAL PROSECUTOR COULD IN WSB PROSECUTE IN ANY CIRCUMSTANCES. SECTION 129A CASES WOULD BE HANDLED

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PAGE 01 BONN 15260 02 OF 03 101941Z

73

ACTION EUR-12

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C O N F I D E N T I A L SECTION 02 OF 03 BONN 15260

BY NORMAL BERLIN LAND COURT, AND PROSECUTION COULD ONLY BE HANDLED BY BERLIN PROSECUTOR ATTACHED TO THAT COURT. FEDERAL PROSECUTOR WOULD HAVE NO COMPETENCE AT ALL FOR SECTION 129A OFFENSES IN BERLIN AND COULD NO LONGER INTERVENE EVEN ON BASIS OF ARGUMENT THAT CASE HAD SPECIAL IMPORTANCE. IN THIS WAY, DUISBERG ARGUED, EXISTING SITUATION WOULD BE CHANGED AND PURPOSE OF THE

NEW LAW -- GETTING A BETTER HANDLE ON TERRORIST
OFFENSES -- WOULD BE FOILED SO FAR AS BERLIN WAS
CONCERNED.

4. TURNING TO THE SECOND PART OF ARTICLE 3, DUISBERG
STATED THAT ARTICLE 3(2) IS CLARIFICATION OF EXISTING
LAW. HE ADMITTED THAT FEDERAL JUSTICE MINISTRY WAS NOT
HAPPY WITH WAY THIS SUBPARAGRAPH (WHICH IS QUOTED IN
PARA 3, REF A) WAS DRAFTED. ITS PURPOSE WAS TO
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PAGE 02 BONN 15260 02 OF 03 101941Z

RESOLVE OCCASIONAL DISPUTES THAT HAVE ARISEN BETWEEN
FEDERAL AND LOCAL PROSECUTOR OVER QUESTION WHETHER ONE
OF THE TYPES OF OFFENSES FOR WHICH HIGHEST LAND COURT
HAS ORIGINAL JURISDICTION WAS INVOLVED OR NOT IN
SPECIFIC CASE. UNDER ARTICLE 3(2) OF NEW LAW, FEDERAL
PROSECUTOR WOULD HAVE EXPRESS AUTHORITY TO MAKE DEFINI-
TIVE DECISION ON THIS QUESTION. DUISBERG'S ANALYSIS
AGREED WITH USBER'S THAT IF ARTICLE 3(2) OF NEW LAW
WERE SUSPENDED FROM APPLICATION IN BERLIN, NOTHING WOULD
BE CHANGED FOR ALL PRACTICAL PURPOSES. THIS IS SO
BECAUSE IF SUCH DISPUTE ARISES, FEDERAL PROSECUTOR
ALREADY HAS THE RIGHT UNDER PROVISIONS OF EXISTING LAW
TO MAKE THE FINAL DECISION.

5. IN DISCUSSION FOLLOWING DUISBERG PRESENTATION, THE
FOLLOWING CONCLUSIONS WERE REACHED:

-- THE TAKEOVER IN BERLIN OF ARTICLE 3(1), WHILE
OPTICALLY HARMLESS, WOULD BE ESSENTIAL TO PRESERVING
THE ABILITY OF THE FEDERAL PROSECUTOR TO HANDLE OFFENSES
UNDER SECTION 129A OF THE PENAL CODE. ADMITTEDLY,
ARTICLE 3(1) MIGHT BE CONSIDERED QUANTITATIVELY TO
INCREASE THE POWERS OF THE FEDERAL PROSECUTOR IN BERLIN
IN THAT IT ADDS ONE MORE OFFENSE (THAT COVERED BY
ARTICLE 129A) TO THE LIST OF THOSE FOR WHICH HE HAS
COMPETENCE. ON ITS FACE, HOWEVER, ARTICLE 3(1)
SIMPLY STATES WHAT COURT WILL HAVE ORIGINAL JURISDIC-
TION OVER THE NEW OFFENSE IN SECTION 129A, AND IT IS
ONLY THROUGH THE OPERATION OF OTHER PROVISIONS OF THE
PROCEDURAL LAW THAT THE COMPETENCE OF THE FEDERAL
PROSECUTOR IS ESTABLISHED.

-- ARTICLE 3(2), ON THE OTHER HAND, WHILE IT HAS
NO SUBSTANTIVE IMPORTANCE IN BERLIN, IS OPTICALLY
TROUBLESOME. IT SPECIFICALLY STATES THAT THE FEDERAL
PROSECUTOR WOULD HAVE THE POWER TO RESOLVE DISPUTES
WITH THE BERLIN PROSECUTOR -- AN APPARENT EXERCISE OF
STATE AUTHORITY.

6. FRG REPS EXPRESSED CLEAR PREFERENCE THAT ENTIRE
LAW BE APPLIED IN WSB WITH NORMAL ALLIED RESERVATIONS
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PAGE 03 BONN 15260 02 OF 03 101941Z

CONCERNING RIGHTS AND RESPONSIBILITIES AND REFERENCE
TO BK/O (51) 63. THEY SUGGESTED POSSIBILITY THAT BK/O
BE SPECIFICALLY MENTIONED AS APPLICABLE WITH RESPECT
TO ARTICLE 3(2) OF NEW LAW. ALLIED REPS AGREED THAT
WHILE BK/O (51) 63 SHOULD IN ANY EVENT BE MENTIONED IN
BK/O CONCERNING APPLICATION OF ANTI-TERRORIST LAW,
THIS ALONE WAS NOT ADEQUATE TO RESOLVE DIFFICULTIES
CREATED BY LANGUAGE OF ARTICLE 3(2) OF NEW LAW. ALLIED
REPS EXPLAINED THAT PURPOSE OF BONN GROUP CONSULTATIONS
ON THIS MATTER WAS NOT TO REQUEST FRG AGREEMENT TO
DELETION OF ARTICLE 3(2). PURPOSE WAS TO OBTAIN
CLARIFICATION OF OPERATION OF NEW LAW AND LEGAL CONSEQUENCE
OF SUSPENSION OF ALL OR PART OF ARTICLE 3, AND
TO DISCUSS POLITICAL EFFECT OF ULTIMATE ALLIED
DECISION ON THIS PARTICULARLY SENSITIVE MATTER. IT
WAS FULLY REALIZED THAT ALLIED ACTION COULD HAVE REAL
OR PERCEIVED IMPLICATIONS FOR THE COMMON FIGHT AGAINST
TERRORISM, FRG UPCOMING ELECTIONS, AND FOR SOVIETS

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PAGE 01 BONN 15260 03 OF 03 101941Z

73

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C O N F I D E N T I A L SECTION 03 OF 03 BONN 15260

IN VIEW OF THEIR INTENSE INTEREST IN MATTERS FALLING
IN THIS AREA.

7. FRENCH, UK AND US REPS AGREED TO RECOMMEND TO
CAPITALS THAT MISSIONS BE INSTRUCTED TO PREPARE BK/O
WHICH WOULD SUSPEND APPLICATION IN WSB OF ARTICLE 3(2)
OF NEW LAW. UK LEGAL ADVISER INDICATED THAT BECAUSE
OF PRINTER'S DEADLINE, BK/O WOULD HAVE TO BE ISSUED
NO LATER THAN SEPT 14 IN ORDER TO BE PUBLISHED IN
BERLIN ON SEPT 20 TOGETHER WITH LAW. ALLIED REPS
AGREED THAT, WHILE NOT LEGALLY ESSENTIAL, THIS WAS
HIGHLY DESIRABLE. ALLIED REPS AGREED, THEREFORE,
TO RECOMMEND TO CAPITALS THAT MISSIONS RECEIVE INSTRU-
CTIONS BY NO LATER THAN MONDAY, SEPT 13.

8. AT TRIPARTITE MEETING SEPT 8, AT WHICH PRELIMINARY
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PAGE 02 BONN 15260 03 OF 03 101941Z

AGREEMENT ON ABOVE RECOMMENDATIONS HAD BEEN REACHED,
ALLIED REPS ALSO AGREED THAT PROPOSED LANGUAGE IN
BK/O (USBER 1737) EXPRESSLY RESERVING TO THE ALLIES
THE RIGHT TO DETERMINE IN PARTICULAR CASE THE APPRO-
PRIATE AUTHORITY FOR CONDUCT OF A PROSECUTION WOULD BE
UNDESIRABLE. IT COULD HAVE EFFECT OF PUTTING ALLIES ON
RECORD AS HAVING APPROVED EVERY SINGLE CASE WHICH
FEDERAL PROSECUTOR FINALLY HANDLES IN WSB. THERE WAS
GENERAL UNEASE AT EFFECT VIS-A-VIS FRG AND USSR OF
SUCH EXPRESS ENGAGEMENT OF ALLIED RESPONSIBILITY WITH
RESPECT TO EACH CASE.

9. ALLIED REPS ALSO AGREED TO RECOMMEND THAT BERLIN
MISSIONS BE ASKED TO PREPARE PRESS GUIDANCE, FOR REVIEW
IN BONN GROUP AND CAPITALS, TO HANDLE QUESTIONS THAT
MAY ARISE ON WHY ARTICLE 3(2) COULD NOT BE TAKEN OVER
IN BERLIN.

10. ACTION REQUESTED:

A. FOR DEPARTMENT: RECOMMEND THAT DEPARTMENT

CONCUR IN AUTHORIZING THE TAKEOVER IN BERLIN OF ALL OF
THE NEW ANTI-TERRORISM LAW WITH THE EXCEPTION OF
ARTICLE 3(2) AND INSTRUCT USBER TO JOIN WITH OTHER
MISSIONS IN DRAFTING THE NECESSARY BK/O;

B. FOR USBER: ASSUMING APPROVAL OF THE FOREGOING
RECOMMENDATION, THAT USBER JOIN WITH OTHER MISSIONS IN
DRAFTING BK/O AND CONSIDERING QUESTION OF NEED FOR
BK/L IN ADDITION. WOULD APPRECIATE RECEIVING DRAFT(S)
FOR CONSIDERATION BY EMBASSIES AT TRIPARTITE MEETING
SCHEDULED FOR MONDAY AFTERNOON, SEPT 13, WITH A VIEW TO
ISSUANCE OF BK/O IF AT ALL POSSIBLE ON SEPT 14. ALSO
REQUEST YOUR ASSISTANCE IN WORKING OUT WITH OTHER
MISSIONS DRAFT PRESS GUIDANCE.
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